United States Court of Appeals

for the Second Circuit

PETITION

J20

No. 74-2010 original

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES L. JASON,

Petitioner

v.

HON. ALBERT W. COFFRIN,

Respondent.

PETITION FOR WRIT OF MANDAMUS

Michael E. Tigar
Williams, Connolly & Califano
1000 Hill Building
Washington, D. C. 20006
(202) 638-6565

Richard A. Axelrod
101 Eastern Avenue
St. Johnsbury, Vermont 05819
(802) 748-8161

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JAMES L. JASON, Petitioner v. HON. ALBERT W. COFFRIN, Respondent.	)	No. _____

PETITION FOR WRIT OF MANDAMUS

Petitioner, by his undersigned counsel, petitions this Court, pursuant to 28 U.S.C. § 1651, for issuance of a writ of mandamus to the respondent, Hon. Albert W. Coffrin, directing him to proceed on the merits of the Motion for Disclosure of Grand Jury Minutes and/or to Dismiss the Indictment in United States v. Jason, Cr. No. 6734 in the United States District Court for the District of Vermont. The grounds for the Petition appear more fully below, in the Statement of Facts, Issues Presented Below and Relief Sought.

Facts

On August 12, 1970, petitioner failed to report for induction into the United States Army. On October 6, 1971, he was indicted in the District of Vermont for that refusal, 50 U.S.C. App. § 462. On October 8, 1971, a warrant was issued for his arrest. The case lay dormant until June 12, 1974, when petitioner's counsel filed a motion to dismiss the indictment. This motion was supplemented on June 28, 1974, with a memorandum of points and authorities, to which was attached as an Exhibit the petitioner's Selective Service file. The motion and memorandum are attached to his petition as Exhibits A and B and are by this reference incorporated herein.

With the motion, counsel filed a statement from the petitioner consenting to the hearing of his motions in his absence.

The motion urged that petitioner's induction order was illegal, citing ample authority that such a question could and should be decided on motion under Federal Rule of Criminal Procedure 12.

On July 1, 1974, the respondent, Hon. Albert W. Coffrin, denied petitioner's motion. The docket entry, attached hereto as Exhibit C and by this reference incorporated herein, reads:

"Motion denied. Defendant will be given leave to refile said motion as such time defendant is no longer a fugitive and personally appears before the Court."

Petitioner submits that the docket entry accurately reflects the proceedings below. The transcript of the July 1, 1974, hearing has been ordered and will be made available to the Court as soon as it is ready.

In this petition, it is argued that the respondent district judge has refused to exercise a jurisdiction he clearly possesses, and therefore is subject to mandamus.

Questions Presented

1. Whether a federal district judge has jurisdiction to hear and decide motions to dismiss an indictment under 50 U.S.C. App. § 462, in the absence of the defendant, when such motions are of the sort permitted and required to be filed prior to trial under Federal Rule of Criminal Procedure 12, when the defendant has filed a signed statement consenting to the judge hearing the motions in his absence.

2. If the answer to the above is "Yes," whether the issues raised by petitioner in the motions filed below may and/or must be heard and decided on motion, given petitioner's consent to such a course.

No issue is raised concerning the merits of the motions filed, as they have not been heard on the merits by the District Court, and the rule in this Circuit is that such consideration must precede review by this Court in Selective Service cases. United States v. Gearey, 368 F.2d 144, (2d Cir. 1966).

Argument

Petitioner shows below that mandamus is appropriate here, and argues the merits of directing the respondent to hear the motions his counsel filed below.

The argument makes clear that this is an important case, and the Court's decision will touch upon the rights of thousands of young men who are in exile because their government unlawfully ordered them to serve in the Armed Forces. The theme running through this petition is: have these young men the right to invoke the federal judicial power as provided in the Rules of Criminal Procedure, or may the Justice Department and the district courts impose such conditions upon their access to the courts as to make their right of redress a dead letter.

I. Mandamus Is Appropriate Here.

Under the All Writs Act, 28 U.S.C. § 1651, and Federal Rules of Appellate Procedure 21, this Court has the authority to issue a mandamus. The Act provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The power of this Court to issue a writ "in aid of" its jurisdiction does not, it hardly bears saying, depend upon appellate jurisdiction already having attached. The Court has power to issue the writ in aid of the appellate jurisdiction over the district court conferred by 28 U.S.C. § 1291, even though that jurisdiction could not usually be exercised save after a final judgment. Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943). Solely by virtue of this prospective power, this Court has the "naked power" to issue the writ. LaBuy v. Howes Leather Corp., 352 U.S. 249, 255 (1957).

The issue is not, therefore, one of power but of prudence, and there are many and strong prudential reasons for granting a mandamus in this case.

In Will v. United States, 389 U.S. 90, 95 (1967), the Court in speaking of the "propriety" of mandamus where the proceeding below was a criminal prosecution, restated that doctrine of Roche which is squarely on point here:

"to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.Citations omitted." Here, as we argue below, there exists a plain duty, a responsibility on the part of respondent to act, Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973) and mandamus lies where a trial court wrongfully refuses to exercise its judicial power, Grace Lines v. Motley, 439 F.2d 1028 (2d Cir. 1971).

Were this even a less compelling case, a question of the "abuse of discretion," this Court would clearly have mandamus power here. Olink v. Dempster Bros., Inc., 365 F.2d 439 (2d Cir. 1966) and cases cited; Filtrol Corp. v. Kelleher, 467 F.2d 242 (9th Cir. 1972), cert. denied, 409 U.S. 1110; Jones v. Gasch, 404 F.2d 1231 (D.C. Cir. 1967), cert. denied, 390 U.S. 1029.

A. The Order Below Was Not Interlocutory.[1/]

The refusal of the District Court to hear the motions is "final," Gialde v. Time, Inc., 480 F.2d 1295 (8th Cir. 1973)

1/ Cf. Cohen v. Beneficial Loan Corp., 33 U.S. 541 (1947); Eisen v. Carlisle & Jacquelin, 42 U.S.L.W. 4804 (U.S.S.C. May 28, 1974). If the Court should determine this not an appropriate case for mandamus, it might direct petitioner to refile his motion and take an appeal under the Cohen "collateral order doctrine." Alternatively, the Court might construe the motions filed as a complaint for injunction and declaratory judgment, vacate the order below and direct that a complaint be filed in the form prescribed by the Rules of Civil Procedure.

"in the sense that [it is] not interlocutory with relation to any pending matter and [is] final as far as any relief to petitioner is concerned . . . ." Application of Johnson, 484 F.2d 791, 794 (7th Cir. 1973). Entertaining this petition does not violate the policy against piecemeal appeals in criminal cases. Cf. Cobbledick v. United States, 309 U.S. 323 (1940); United States v. DiBella, 369 U.S. 121, 125 (1962); United States v. Will, 389 U.S. 90 (1967).

B. This Court Has "Supervisory" Responsibilities Over the District Courts.

In Johnson, the Seventh Circuit spoke in its "supervisory" capacity, relying on the Supreme Court's opinion in LaBuy. This doctrine of "supervisory mandamus" is well established and has been invoked with increasing frequency by the federal appellate courts in recent years. See, Note, 86 Harvard L. Rev. 595 (1973), and the cases cited in that Note "allow[ing] use of the writ traditional doctrines would not permit . . . ." Id. at 598. In analyzing LaBuy, the author reasons:

> "The greater part of the opinion was devoted to the issues Justice Clark grouped under the caption '[t]he [d]iscretionary [u]se of the [w]rits . . . .' It made no attempts to square the facts of the case with the Court's precedents or with the definitions of the term 'abuse of power' those precedents had set down or would have supported (citations omitted).

"The Court's reliance was clearly upon a less familiar rationale. This was expressed primarily in one clarion statement in the opinion: 'We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to the proper judicial administration in the federal system. (Citations omitted)

* * * *

"This language and this holding have been taken by both courts and commentators to establish a new category of 'supervisory' mandamus, authorized by propriety standards distinct from those which traditionally governed the availability of the writs.

* * * *

"Of central importance is the implication that mandamus could and would be used to prevent or to deter the recurrence in the future of an erroneous practice a court of appeals feared might arise and therefore wished to discourage." Id. at 605, 606, 607, 609.

C. What is "Supervisory Mandamus"?

Here, as in Schlagenhauf v. Holder, 379 U.S. 104 (1964), the Court faces "new and important problems" and "issues of first impression." Id. at 110-11. In In Re Ellsberg, 446 F.2d 954 (1st Cir. 1971), United States v. U.S.D.C., 444 F.2d 651 (6th Cir. 1971), affirmed 407 U.S. 497 (1972), and United States v. Hughes, 413 F.2d 1244 (5th Cir. 1969), vacated as moot sub. nom. United States v. Gifford-Hill American, Inc., 397 U.S. 93 (1970), the Courts of Appeals have relied on the Schlagenhauf view of the mandamus power to decide questions of first impression.

As far as petitioner is able to ascertain, the questions presented below are those of "first impression" in the Circuit and by virtue of the lack of case law, they are "novel" ones.

The Note cited above suggests two guidelines for the continued use of advisory mandamus.

> "First, care should be taken that the issues whose presence authorizes mandamus be in fact both 'novel' and 'important.'" (Id. at 618).

We think there can be no quarrel that petitioner here presents such questions.

> "Second, any form of advisory mandamus should be invoked only when the appellate court in fact intends to lay down general guidelines settling many of the questions that surround the novel issue." (Id. at 618).

As to this second condition, one of the questions presented here is the respondent's interpretation and application of the Federal Rules of Criminal Procedure.

This Court has imposed on itself the duty to "prevent . . . disruptions of the orderly administration of criminal justice in this circuit whenever it can . . . ." United States v. Lasker, 481 F.2d 229, 236 (2d Cir. 1973). See also, United States v. Dooling, 406 F.2d 192 (2d Cir. 1969). In Lasker, this Court held that "supervisory authority by means of mandamus" is "particularly appropriate" in instances involving the application by district court judges of rules promulgated by the judges of the Courts of Appeals. "Having given the district courts a weapon by which to dismiss indictments, we have the power through mandamus to see that it is not wielded in a manner that subverts or ignores the interests that were intended to be served." Lasker at 235.

How much more plain is the duty to see that the Rules of Criminal Procedure promulgated by the Supreme Court of the United States are respected. Cf. Schlagenhauf v. Holder, supra. In upholding those rules, the supervisory authority of appellate courts is manifest. Mallory v. United States, 354 U.S. 449 (1957).

Federal Rule of Criminal Procedure 2 provides a guideline for exercise of the Court's authority:

> "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustificable expense and delay."

Surely this Court has the power through a writ of mandamus to advise the lower courts as to the proper application of the federal rules in any criminal prosecution. Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973).

In particular and pointed reference to this case,

> "The duty of a trial court to act on an indictment is clear; mandamus will lie in the event that the trial court refuses so to act. Refusal to proceed is to be equated with refusal to enforce the law." (Citations omitted)

United States v. Kysar, 459 F.2d 422 (10th Cir. 1972).

In sum, prudence, policy, tradition and duty support exercise of the jurisdiction conferred by the All Writs Act.

II. Respondent Had the Power and the Duty to Hear and Decide Petitioner's Motion.

Under the Federal Rules, the court below has the power to decide this case. Its power is neither altered nor diminished by the defendant's voluntary absence from these proceedings. Counsel and the court know that defendants are often not present at hearings on pretrial motions. Federal Rule of Criminal Procedure 43 provides:

> "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."

There is no mandatory provision, therefore, for a defendant's presence at pretrial motions, and his right to be present is waivable by a writing of the kind filed below. See also Federal Rule of Criminal Procedure 43 (c)(3).

There remains only the question whether respondent may hear these motions on behalf of one not in the jurisdiction, who has not been arraigned. The answer, provided by the rules themselves and the common law practice they reflect, is that the court must hear these motions.

The arraignment and plea provided for in Federal Rule of Criminal Procedure 10 is usually the first step in modern criminal cases. Even the benefits of Rule 10 may be waived. Garland v. Washington, 232 U.S. 642 (1914). The arraignment was formerly the occasion for certain pleas in bar and abatement, but these pleas are abolished by Federal Rules of Criminal Procedure 11 and 12.

Federal Rule of Criminal Procedure 12, as amended, provides that:

> "(b) Pretrial motions.--Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> "(1) Defenses and objections based on defects in the institution of the prosecution; or
>
> "(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or
>
> "(3) Motions to suppress evidence; . . ."

This provision recognizes the common law practice whereby motions were always heard and decided prior to the entry of a plea, and Rule 12 continues to permit this practice. Indeed, some courts still wonder whether a plea even of not guilty waives the right to make pretrial motions to dismiss such as contemplated in Rule 12. The question was not free from doubt in, for example, Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969), so the court underscored in a footnote that the defendant had not waived his attack on the legality of the indictment by pleading to it.

This reading of the Rules is particularly suited to selective service cases, where the legal arguments for dismissal are necessarily jurisdictional under Estep v. United States, 327 U.S. 114 (1946) and its progeny. Whatever may be the merit of requiring the defendant to have "checked in" with the court to make technical motions, no such justification exists when, as here, there is a well-supported contention that the indictment ought never to have been returned. Indeed, violation of federal statutory and constitutional rights has always justified forthright and even exceptional exercises of federal judicial power. See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965); NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966).

Thus the Rules themselves provide that the respondent had the power and duty to decide

For such a course there is ample precedent. Not only was it the rule at common law that the plea to the general issue was uniformly and only the plea of guilty or not guilty. See, e.g., Singer v. United States, 380 U.S. 24 (1965), and works there cited. The common law also provided that the plea to the general issue took place only after all other pleas had been rejected. These other pleas -- in bar and abatement -- are today brought together under the name "motion" and may be made -- in some cases, must be made -- prior to plea under Rule 12.

To the extent that the government's acquiescence in hearing petitioner's claims is an issue here, petitioner invites the Court's attention to Exhibit D, pp. 2-3, attached to this petition and by this reference incorporated herein. The exhibits shows the existence of a Department of Justice policy of consenting to dismissal of some cases like petitioner's, and of refusing consent in other cases. Apparently, the choice is made by any of a number of prosecutorial officials, each acting in his or her unbridled discretion. That so formidable a power as that to keep a citizen in exile should be administered unevenly and arbitrarily raises a serious constitutional issue under the due process clause. Yick Wo v. Hopkins, Sheriff, 118 U.S. 356, 373-74 (1886); Dixon v. District of Columbia, 394 F.2d 966 (D.C. Cir. 1968).

Consent to dismissal has been given. Se Exhibit E, attached hereto and by this reference incorporated herein. Exhibit E is the record of dismissal of a prosecution under 50 U.S.C. App. § 462 in Kentucky, apparently under the "Petersen policy" outlined in Exhibit D.

III. Petitioner's Contentions Were Properly Raised by Pretrial Motion.

If this Court should reach and decide issues raised in Parts I and II of this Petition, it may wish to provide guidance to the respondent respecting the kinds of issues properly raised by pretrial motion in cases such as this. For this reason, we discuss the unique problems raised under Federal Rule of Criminal Procedure 12 by selective service cases.

Federal Rule of Criminal Procedure 12(b) provides:

> "Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion."

In federal criminal practice, the general issue is that raised by the plea of not guilty, and triable by the jury. It is settled that in selective service cases the jury does not consider the legality of the defendant's induction order, nor review the administrative process leading up to that order. Courts are virtually unanimous in holding that a pretrial motion is the preferred means of challenging illegality in the defendant's induction processing, because it saves the time of judges, jurors and lawyers.

In Cox v. United States, 332 U.S. 422, 452 (1947), the Court held (in an opinion subscribed to on this point by a majority of the Court and announcing the Court's judgment):

> "Whether or not there was 'no basis in fact' for a classification is not a question to be determined by the jury on independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order."

The holding of Cox followed from Estep v. United States, supra, in which the Court limited review of selective service decisions to whether or not the local board had exceeded its jurisdiction in classifying the registrant.

Despite efforts by the selective service defense bar to permit the jury a greater role, the government has always been successful in arguing for the continued vitality of Cox and its strict application. For example, in United States v. Boardman, 419 F.2d 110, 114 (1st Cir. 1969), cert. denied, 90 S. Ct. 1124 (1970), the Court described the jury's role in narrow terms and stated that it was to consider only two issues:

> "To sustain conviction under this statute, the government must show awareness of legal obligation and a deliberate purpose not to comply. . . . [The question is] whether he knowingly and deliberately failed to report. . . ."

Other courts, speaking of Rule 12 motions in selective service cases, have held that the continued vitality of Cox dictates that all legal defenses to a selective service prosecution should be raised by motion. United States v. Seeley, 301 F. Supp. 811 (D. R.I. 1969); United States v. O'Rourke, 341 F. Supp. 622 (S.D.N.Y. 1972); United States v. Velazquez, 359 F. Supp. 448 (S.D.N.Y. 1973); United States v. Ponto, 454 F.2d 647 (7th Cir. 1971).

The court in Seeley, reasoning that "the improper processing of the defendant would not be admissible before the jury to diminish the requisite intent," 301 F. Supp. at 812, held:

> "I do think that the breadth of Rule 12(b)(1) permits a motion to dismiss a 50 U. S. App. Sec. 462(a) indictment to be made, as a procedural matter, to the court when the defendant is attacking the classification process. Such a ruling is in my view a time-saving and fair procedure which admirably comports with the function of the courts in reviewing Selective Service System decision-making." at 813

The court then reached the merits and dismissed the prosecution.

Other courts have reasoned in similar fashion. The cases are collected and analyzed in O'Rourke, 341 F. Supp. at 627-28. As the district judge said in Velazquez, 359 F. Supp. at 453:

> "The Court also notes that there is growing and persuasive precedent for pre-trial dismissal in Selective Service cases, where the critical issue is one that could not be given to a jury in any event, and the Court is able to resolve it prior to trial." [Citing cases.]

See also, Federal Rule of Criminal Procedure 12(b)(4), empowering the court to find the facts in all cases where the Constitution does not require a jury.

Of course. pretrial resolution of all issues that can be so resolved is a strong policy in federal criminal procedure with impressive credentials in law and logic. See, e.g., Jones v. United States, 362 U.S. 257 (1960); Battle v. United States, 345 F.2d 441 (D.C. Cir. 1965). In the 1972 amendments to Federal Rule of Criminal Procedure 41, the Supreme Court added subdivision (f), providing for a motion to suppress in the district of trial under Federal Rule of Criminal Procedure 12. This action (see Advisory Committee Notes, in the U.S.C.A. edition of the Rules) makes the rule of pretrial decision reflected in Jones and Battle applicable also when a motion is filed under Federal Rule of Criminal Procedure 12.

Even prior to 1972, however, and in fields other than selective service, Rule 12 has customarily been given a broad interpretation. See, e.g., United States v. Rickenbacker, 27 F.R.D. 485 (S.D.N.Y. 1961) (subpoena may issue under Rule 17 for taking of testimony on Rule 12 motion); United States

v. Laut, 17 F.R.D. 31 (S.D.N.Y. 1955) (where false statements charged are not even probably material, indictment may be dismissed under Rule 12); Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968) (claim of statutory discrimination may be raised by Rule 12 motion and decided after evidentiary hearing thereon); United States v. Briddle, 212 F. Supp. 584 (S.D. Calif. 1962) (trial court may receive evidence on Rule 12 motion).

The motions filed below may therefore be heard and decided, even if decision requires reception of evidence (such as the selective service file) or even the testimony of substantive witnesses. The test is whether or not the matter submitted lies within that narrow scope of issues reserved to the jury and therefore necessarily part of the "general issue." The object of proceeding by motion is to conserve the time of the court and parties, and to do justice in one of a large class of cases where justice has for too long been delayed.

Conclusion

WHEREFORE, petitioner prays that the writ of mandamus issue.

Michael E. Tigar
Williams, Connolly & Califano
1000 Hill Building
Washington, D. C. 20006
(202) 638-6565

Richard A. Axelrod (ant.)
Richard A. Axelrod
101 Eastern Avenue
St. Johnsbury, Vermont 05819
(802) 748-8161

Attorneys for Petitioner 2/

2/ Counsel acknowledge with thanks the research and drafting assistance of Madeleine R. Levy, law clerk.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Petition for a Writ of Mandamus were served upon each of the following by Air Mail Special Delivery this 22 day of July, 1974:

Honorable Albert W. Coffrin
United States District Court
for the
District of Vermont
Burlington, Vermont 05401

United States Attorney
Federal Building
Rutland, Vermont 05701

Michael E. Tigar

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	
	:	
vs.	:	CRIMINAL NO.
	:	
JAMES L. JASON	:	

MOTION FOR DISCLOSURE OF GRAND JURY

MINUTES AND/OR TO DISMISS THE INDICTMENT

The defendant, by his undersigned counsel and pursuant to F.R.Crim.P. 6 and 12, moves this Court for an order requiring the attorney for the United States to furnish a copy of the minutes of the grand jury which returned the indictment herein.

Defendant further moves, pursuant to F.R.Crim.P. 12, to dismiss the indictment against him if:

a. the government should decline to produce the minutes, or

b. the minutes having been produced, it should appear that the grand jury indictment was not lawfully returned.

The defendant expressly waives his right to be present at the proceedings requested herein; attached hereto is a writing executed by defendant wherein such is stated.

Respectfully submitted,

Dated June 11, 1974

of counsel:
Michael E. Tigar
B.P. No. 2
Speracedes, France
06970

Richard A. Axelrod
ATTORNEY FOR DEFENDANT
101 Eastern Avenue
P.O. Box 335
St. Johnsbury, VT 05819

I, James T. Jason, appoint Michael E. Tigar and Richard A. Axelrod as my attorneys at law and in fact to represent me in all matter relating to the charge presently pending against me under the Selective Service laws and any lesser or related charge which have been or may be brought in connection therewith. I authorize them to file all necessary motion and I specifically waive my right to be present at all motion and hearings at which my presence is not required by law, including all motion authorized or required to be heard under Rules 12 and 41, Federal Rules of Criminal Procedure.

Signed: James T. Jason
Date: April 15, 1974

EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

UNITED STATES OF AMERICA	:	CRIMINAL NO. 6734
	:	MEMORANDUM IN SUPPORT OF
vs.	:	DEFENDANT'S MOTION FOR
	:	DISCLOSURE OF GRAND JURY
JAMES L. JASON	:	MINUTES AND/OR TO DISMISS
	:	THE INDICTMENT

GRAND JURY MINUTES

Since Dennis v. United States, 384 U.S. 855 (1966), a defendant's access to grand jury minutes has been greatly enhanced. See also United States v. Youngblood, 379 F.2d 365 (2d Cir. 1967); Allen v. United States, 390 F.2d 476 (D.C. Cir. 1968).

The defendant needs the minutes in this case to determine whether the indictment was lawfully returned. In this connection, and reserving the right to present further argument and evidence, the Court's attention is respectfully directed to the recent opinion in United States v. Daneals, et al, 370 F. Supp. 1289 (W.D.N.Y. 1974). This opinion, which counsel submits, reflects a far too frequent grand jury practice in selective service cases, demonstrates that "grounds may exist for a motion to dismiss the indictment for matters occurring before the grand jury," F.R.Crim.P. 6(e).

ABSENCE OF DEFENDANT

Under the Federal Rules, this court has the power to decide this case. Its power is neither altered nor diminished by the defendant's voluntary absence from these proceedings. Counsel

RICHARD A. AXELROD
ATTORNEY AT LAW
101 EASTERN AVENUE
BENNINGTON, VERMONT
05201

and the court know that defendants are often not present at hearings on pretrial motions. Federal Rule of Criminal Procedure 43 provides:

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

There is no mandatory provision, therefore, for a defendant's presence at pretrial motions, and his right to be present is waivable by a writing of the kind filed in this matter.

There remains only the question whether the court may hear these motions on behalf of a defendant not in the jurisdiction, who has not been arraigned. The answer, provided by the rules themselves and the common law practice they reflect, is that the court must hear these motions.

The arraignment and plea provided for in F.R.Crim.P. 10 is usually the first step in modern criminal cases. Even the benefits of Rule 10 may be waived. Garland v. Washington, 232 U.S. 642 (1914). The arraignment was formerly the occasion for certain pleas in bar and abatement, but these pleas are abolished by F.R. Crim.P. 11 and 12.

Finally, F.R.Crim.P. 12 provides that:

> (b)(3) The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

> (b)(5) If a motion is determined adversely to the defendant

EDWARD A. AXELROD
ATTORNEY AT LAW
91 EASTERN AVENUE
JOHNSBURY, VERMONT
05819

he shall be permitted to plead if he had not previously pleaded.

This provision recognizes the common law practice whereby motions were always heard and decided prior to the entry of a plea. Indeed, some courts still wonder whether a plea even of not guilty waives the right to make pretrial motions to dismiss such as contemplated in Rule 12. The question was not free from doubt in, for example, Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969), so the court underscored in a footnote that the defendant had not waived his attack on the legality of the indictment by pleading to it.

This reading of the Rules is particularly suited to selective service cases, where the legal arguments for dismissal are necessarily jurisdictional under Estep v. United States, 327 U.S. 114 (1946) and its progeny. Whatever may be the merit of requiring the defendant to have "checked in" with the court to make technical motions, no such justification exists when, as here, there is a well-supported contention that the indictment ought never to have been returned. Indeed, violation of federal statutory and constitutional rights has always justified forthright and even exceptional exercises of federal judicial power. See, e.g., Dombrowski v. Pfister, 380 U.S. 479 (1965); NAACP v. Thompson, 357 F.2d 831 (5th Cir. 1966).

Thus the Rules themselves provide that the court has the power and duty to decide these motions here and now. There is also the question of simple justice. Many thousands of young

RICHARD A. AXELROD
ATTORNEY AT LAW
501 EASTERN AVENUE
S. JOHNSBURY, VERMONT
05819

Americans, fearing the climate of opinion in their country, left the United States rather than submit to the danger and expense of a criminal trial. In the meantime, the intensive research of judges and lawyers has brought some order and reason to the selective service law. The decisions reported in the Selective Service Law Reporter show that the perception of unfairness which led these young men to continue in other lands their efforts for peace has come to be shared by others, judges among them. Now these young men want to end the uncertainty which plagues every exile--can I go home to see my home and family? Most of these young men are in the same position as the defendant herein: their induction orders are illegal, and can be shown to be so in a hearing on a pretrial motion. Is it just or reasonable for them to be required to interrupt their lives and work in order to be spectators at a pretrial motion hearing? Surely not, when such a hearing is--as are they all, in the end--a lawyers' contest.

This is not, counsel wishes to stress, an amnesty case. The defendant does not ask to be forgiven for anything, to have illegal conduct excused or sins remitted. He seeks the exercise of a judicial jurisdiction to notice and declare a plain illegality; he wishes a declaration that his government violated the law in processing him for induction.

For such a course there is ample precedent. Not only was it the rule at common law that the plea to the general issue was uniformly and only the plea of guilty or not guilty. See e.g., Singer v. United States, 380 U.S. 24 (1965), and works there cited.

HARD A. AXELROD
TTORNEY AT LAW
EASTERN AVENUE
OMSBURY, VERMONT
06819

The common law also provided that the plea to the general issue took place only after all other pleas had been rejected. These other pleas--in bar and abatement--are today brought together under the name "motion" and may be made--in some cases, must be made--prior to plea under Rule 12.

PRETRIAL MOTIONS UNDER
FEDERAL RULE OF CRIMINAL PROCEDURE
12 ARE THE PROPER MEANS TO PRESENT THE
ISSUES RAISED BY MOTIONS BEFORE THIS COURT

Federal Rule of Criminal Procedure 12 (b)(1) provides:

> Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

In federal criminal practice, the general issue is that raised by the plea of not guilty, and triable by the jury. It is settled that in selective service cases the jury does not consider the legality of the defendant's induction order, nor review the administrative process leading up to that order. Courts are virtually unanimous in holding that a pretrial motion is the preferred means of challenging illegality in the defendant's induction processing, because it saves the time of judges, jurors, and lawyers.

In Cox v. United States, 332 U.S. 422, 452 (1947), the Court held (in an opinion subscribed to on this point by a majority of the court and announcing the court's judgment):

> Whether or not there was "no basis in fact" for a classification is not a question to be determined

RICHARD A. AXELROD
ATTORNEY AT LAW
101 EASTERN AVENUE
ST. JOHNSBURY, VERMONT
05819

by the jury on independent consideration of the evidence. The concept of a jury passing independently on an issue previously determined by an administrative body or reviewing the action of an administrative body is contrary to settled federal administrative practice; the constitutional right to jury trial does not include the right to have a jury pass on the validity of an administrative order.

The holding of Cox followed from Estep v. United States, 327 U.S. 114 (1946), in which the Court limited review of selective service decisions to whether or not the local board had exceeded its jurisdiction in classifying the registrant.

Despite efforts by the selective service defense bar to permit the jury a greater role, the government has always been successful in arguing for the continued vitality of Cox and its strict application. For example in United States v. Boardman, 419 F.2d 110, 114 (1st Cir. 1969), cert. denied, 90 S. Ct. 1124 (1970), the court described the jury's role in narrow terms and stated that it was to consider only two issues:

> To sustain conviction under this statute, the government must show awareness of legal obligation and a deliberate purpose not to comply. ... [The question is] whether he knowingly and deliberately failed to report. ...

Other courts, speaking of Rule 12 motions in selective service cases, have held that the continued vitality of Cox dictates that all legal defenses to a selective service prosecution should

CHARD A. AXELROD
ATTORNEY AT LAW
91 EASTERN AVENUE
JOHNSBURY, VERMONT
05819

be raised by motion. United States v. Seeley, 301 F.Supp. 811 (D.R.I. 1969); United States v. O'Rourke, 341 F.Supp. 622 (S.D.N.Y. 1972); United States v. Velazquez, 359 F.Supp. 448 (S.D.N.Y. 1973); United States v. Ponto, 454 F.2d 647 (7th Cir. 1971).

The court in Seeley, reasoning that "the improper processing of the defendant would not be admissible before the jury to diminish the requisite intent,"301 F.Supp. at 812, held:

> I do think that the breadth of Rule 12(b)(1) permits a motion to dismiss a 50 U.S.App. Sec. 462(a) indictment to be made, as a procedural matter, to the court when the defendant is attacking the classification process. Such a ruling is in my view a time-saving and fair procedure which admirably comports with the function of the courts in reviewing Selective Service System decision-making. 301 F.Supp. at 813.

The court then reached the merits and dismissed the prosecution.

Other courts have reasoned in similar fashion. The cases are collected and analyzed in O'Rourke, 341 F.Supp. at 627-28. As the district judge said in Velazquez, 359 F.Supp at 453:

> The Court also notes that there is growing and persuasive precedent for pre-trial dismissal in selective service cases, where the critical issue is one that could not be given to a jury in any event, and the Court is able to resolve it prior to trial. [Citing cases.] See also F.R.Crim.P. 12(b)(4), empowering the court to find

CHARD A. AXELROD
ATTORNEY AT LAW
61 EASTERN AVENUE
JOHNSBURY, VERMONT
05819

the facts in all cases where the Constitution does not require a jury.

Of course, pretrial resolution of all issues that can be so resolved is a strong policy in federal criminal procedure with impressive credentials in law and logic. See, e.g., Jones v. United States, 362 U.S. 257 (1960); Battle v. United States, 345 F.2d 441 (D.C. Cir. 1965). In the 1972 amendments to Federal Rule of Criminal Procedure 41, the Supreme Court added subdivision (f), providing for a motion to suppress in the district of trial under F.R.Crim.P. 12. This action (see Advisory Committee Notes, in the U.S.C.A. edition of the Rules) makes the rule of pretrial decision reflected in Jones and Battle applicable also when a motion is filed under F.R.Crim.P. 12.

Even prior to 1972, however, and in fields other than selective service, Rule 12 has customarily been given a broad interpretation. See, e.g., United States v. Rickenbacker, 27 F.R.D. 465 (S.D.N.Y. 1961) (subpoena may issue under Rule 17 for taking of testimony on Rule 12 motion); United States v. Lent, 17 F.R.D. 31 (S.D.N.Y. 1955) (where false statements charged are not even probably material, indictment may be dismissed under Rule 12); Washington v. United States, 401 F.2d 915 (D.C. Cir. 1968) (claim of statutory discrimination may be raised by Rule 12 motion and decided after evidentiary hearing thereon); United States v. Friedel, 212 F.Supp. 584 (S.D.Calif. 1962) (trial court may receive evidence on Rule 12 motion).

The motions filed in this case may therefore be heard and decided, even if decision requires reception of evidence (such as

HARD A. AXELROD
TTORNEY AT LAW
EASTERN AVENUE
DDISBURY, VERMONT
05818

the selective service file) or even the testimony of substantive witnesses. The test is whether or not the matter submitted lies within that narrow scope of issues reserved to the jury and therefore necessarily part of the "general issue." The object of proceeding by motion is to conserve the time of the court and parties, and--as we argue below--to do justice in one of a large class of cases where justice has for too long been delayed.

An examination of the selective service record of defendant furnished to counsel for defendant and attached hereto as exhibit A, pages 1-46, would appear to indicate sufficient error in the administrative processing of defendant's file to require a dismissal of the case.

CONSCIENTIOUS OBJECTOR CLAIM

In May of 1965, one year after his initial selective service registration and over five years before his failure to report for induction, defendant executed and submitted a Form 150, Special Form for Conscientious Objector (3-7). The basis of his claim was his strict adherence to the tenants of the Seventh Day Adventist sect. A close examination of the Form shows it to be detailed and, at a minimum, to set forth a *prima facie* claim for classification as a conscientious objector.

Eight days after submission of this Form 150, defendant was classified II-S (student deferment), exhibit A, page 1. After several additional classifications of II-S, on August 13, 1968 he was classified II-A (occupational deferment) based on his teaching position. Defendant was continued in this classification until May of 1970 when he was classified I-A. There is no evidence in

HARD A. AXELROD
TTORNEY AT LAW
EASTERN AVENUE
ORNERBURY, VERMONT
05819

defendant's selective service file that his extant application for conscientious objection was ever considered by his local selective service board.

Assuming arguendo that the claim for classification as a conscientious objector was considered, the file does not reveal that any reasons were ever furnished as to why the claim was rejected. It is of course the universal rule that when a prima facie claim for I-O classification is set forth, the rejection of such a claim must be supported by legally sufficient and stated reasons. Joseph v. United States, 405 U.S. 1006 (1972); United States v. Stewart, 451 F.2d 1203 (2d Cir. April 25, 1973).

IMPROPER REMOVAL OF OCCUPATIONAL DEFERMENT

In August of 1968 defendant was classified II-A on the basis of his teaching position at the Middlebury Union High School. In January of 1970, the local board sent a letter to his employer stating that absent a showing of "extenuating circumstances" defendant's occupational deferment would not be extended beyond the current semester. Attachment A, page 23. The reason given was "to insure that deferments do not result in the exemption of a young man from his inherent military obligation to his country."

Selective service regulations in effect in 1970 do not appear to have included as a criteria for the granting of occupational deferments whether the recipient would be exempted from military service.1/ Furthermore, an examination of defendant's file (page 2)

1/ 32 C.F.R. §1622.22 provided:

"(a) In Class II-A shall be placed any registrant whose employment in industry, or other occupation or employment, or whose activity in research, or medical, scientific, or other endeavors is found to be necessary to the maintenance of the national health, safety, or interest." §1622.23 specifies the criteria the local board is to use in arriving at a decision under §1622.22(a).

HARD A. AXELROD
TTORNEY AT LAW
EASTERN AVENUE
DDLEBURY, VERMONT
05753

reveals that his occupational deferment was to have lasted until May 22, 1970. The legality of its premature removal on May 5 is questionable, especially since the school year had not ended at that point. 32 C.F.R. §1623.2, in effect on May 5, 1970, required classification decisions be based on existing status, not what the future may have held.

It should also be noted that a local draft board may not arbitrarily reopen a registrant's classification. The Court of Appeals for the Second Circuit has made this point clear:

> "... no draft classification can be reopened on the local board's own motion unless the action is based upon facts not considered which, if true, would justify a change in the registrant's classification." United States ex rel Zelman v. Carpenter, 457 F.2d 621 (2d Cir. 1972) (emphasis supplied). -III-A case.

This general rule has been held specifically applicable to occupational deferment cases. United States ex rel Mamebba v. Meff, 446 F.2d 1164 (3rd Cir. 1970).

Finally, as was the case with the handling of defendant's claim for conscientious objection, no reasons were ever given for the ultimate rejection of defendant's claim for occupational deferment. A district court in the Western District of Michigan has held such an obligation exists and in so doing noted:

> "The requirement is even more essential and less objectionable when entitlement to a contested classification may be measured strictly from objective facts." United States v. Bennett, - F.Supp.- (W.D.Mich. 1972),

ARD A. AXELROD
ORNEY AT LAW
EASTERN AVENUE
NBURY, VERMONT
05819

5 SSLR 3687.

Bennett involved a teacher who lost his occupational deferment after one year. See also United States ex rel Bent v. Laird, 453 F.2d 625 (3rd Cir. 1971) holding the requirement of statement of reasons rule applies to III-A (hardship cases) as well.

DENIAL OF APPEAL

On May 5, 1970, the defendant was classified I-A. It was this classification which led to the induction order which forms the basis of the outstanding indictment. Selective Service Regulations in effect at that time allowed an employer to appeal in a II-A case. 32 C.F.R. §1626.2 (c). One additional provision of the Regulations deserves quoting:

> "§1626.11 How Appeal to Appeal Board is Taken.-(a)... The language of any such notice shall be liberally construed in favor of the person filing the notice so as to permit the appeal."

After the defendant's employer learned that he might lose his occupational deferment, three letters were forthcoming. The first, received by the local board one day (May 4, 1970) before the defendant lost his II-A deferment but considered the next day when he was reclassified, was a letter from the Superintendent of Schools and reads in part: "Please consider this an appeal to continue his deferment on the basis of his good record as a teacher..." Attachment A, page 24.

The second, from the principal of his school, arrived at the Board twenty days (May 25, 1970) after reclassification and reads:

ARD A. AXELROD
TTORNEY AT LAW
EASTERN AVENUE
ORNBURY, VERMONT
05819

"I therefore, respectfully request that Mr. Yendrzeski (Jason) be removed from class I-A so that he may remain as a mathematics teacher on the faculty at Middlebury Union High School." Page 26. It is, of course, well established that where a request for a procedural right is made, no matter how unclearly,

> "... it is the duty of the Board to continue it in favor of the registrant and if need be to obtain clarification..." United States v. Wilson, 345 F.Supp. 894 (S.D.N.Y. 1972).

The third letter, from the chairman of the defendant's department, sets forth why he deemed the continued employment of the defendant essential. This letter was received by the Local Board on June 1, 1970 and states that:

> "I am writing this letter on the behalf of James L. Yendrzeski (Jason), who I understand is appealing his recent draft status charge...Therefore, when you do receive his appeal, I would appreciate your consideration to grant him a deferment for the 1970-1971 school year." Page 27.

The Board considered this letter on June 2, 1970, page 29; it appears they never considered the defendant to have appealed. His period to perfect an appeal, or have one perfected for him by his employer, expired thirty days (30) from May 5, 1970. The Board, instead of immediately on June 2 notifying anybody that they did not have on file a request for an appeal, waited until the time for taking an appeal had elapsed and then informed the defendant and his employer that no request for an appeal was ever

HARD A. AXELROD
TORNEY AT LAW
EASTERN AVENUE
DDLEBURY, VERMONT
05753

received. "Registrants are not to be treated as though they were engaged in formal litigation assisted by counsel," United States v. Turner, supra at 1255; Simmons v. United States, 348 U.S. 397, 404 n.5 (1955). 421 F2d 1251 (3rd Cir. 1970)

Respectfully submitted,

June 28, 1974

Richard A. Axelrod

RICHARD A. AXELROD
ATTORNEY AT LAW
101 EASTERN AVENUE
ST. JOHNSBURY, VERMONT
05819

EXHIBIT C

Cr. 6734

COFFRIN

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

D.C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	*For U.S.:*
vs.	U. S. Attorney
JAMES L. JASON	
RECEIVED	
JUL 03 1974	*For Defendant:*
RICHARD A. AXELROD	Richard A. Axelrod, Esq. 101 Eastern Ave., P.O. Box St. Johnsbury, VT 05819
	Michael E. Tigar, Esq. B.P. No. 2 Speracedes, France 06

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed NOV 5 1971	Clerk					
J.S. 3 mailed	Marshal					
Violation	Docket fee					
Title 50						
Sec. 462						

DATE	PROCEEDINGS
1971	
Oct. 6	Filed Indictment for violation of Section 462, Title 50, U.S.C.
" "	" Record of Grand Jurors Concurring.
" 8	" Warrant for Arrest of Defendant and delivered same to Marshal for service.
1974	
June 12	Filed Deft.'s Motion for Disclosure of Grand Jury Minutes and/or to Dismiss the Indictment, and Deft.'s Waiver of Presence.
" 28	Filed Memorandum in support of Defendant's Motion for Disclosure of Grand Jury Minutes and/or to Dismiss the Indictment.
July 1	In Chambers before Judge Coffrin, hearing on defendant's motion for disclosure of Grand Jury Minutes and/or to dismiss the Indictment. Jerome O'Neill, Esq. for Government; Richard Axelrod, Esq. for Defendant.
" "	Ordered: Motion denied. Defendant will be given leave to renew said motion at such time defendant is no longer a fugitive and personally appears before the Court.

EXHIBIT D

Assistant Attorney General
Criminal Division

Department of Justice
Washington 20530

April 27, 1973

TO ALL UNITED STATES ATTORNEYS

SELECTIVE SERVICE CASES

Prosecutive Policy With Respect to Persons Who Fail to Register Timely Under the Provisions of the Military Selective Service Act

The authority to induct men for training and service in the Armed Forces under the Provisions of the Military Selective Service Act expires on July 1, 1973, except that men who have been deferred under the provisions of Section 6 (50 U.S.C. App. 456) may continue to be inducted after the basis for their deferment ceases to exist. However, in January the Department of Defense cancelled all draft calls and initiated plans for an all volunteer armed forces so that, in effect, the induction processing has terminated for all intents and purposes.

Although the induction authority will not exist after July 1, 1973, the registration requirements of the Act will continue in effect indefinitely, and the Selective Service System will continue to report for consideration of prosecution of men who have failed to register and those who registered more than 30 days following the eighteenth anniversary of their date of birth. The following prosecutive guidelines are furnished for use in determining whether criminal prosecution of non-registrants and/or late registrants is warranted.

An individual subject to the registration provisions of the Act who has not registered, and more than thirty (30) days have passed since the final date fixed for his registration, should be indicted absent compelling reasons to justify his failure to register.

Individuals who are reported as having registered late, i.e., more than thirty (30) days after the final date fixed for their registration should be processed as follows:

(a) Where the individual's age group was assigned a Random Sequence Number in either the 1969, 1970, or 1971 lottery drawing prior to the date of his registration, and that number was higher than the ultimate "cut-off" number for draft calls, so that he was not processed for induction, criminal prosecution should be initiated.

(b) Where the Random Sequence Number assigned his age group was lower than the ultimate "cut-off" number and he registered before that number was reached so that he was available for possible induction processing, prosecution may be declined.

(c) Prosecution may also be declined as to an individual subject to either the 1969, 1970, or 1971 lottery drawing who registered late but prior to the assignment of a Random Sequence Number to his age group.

Actual levies on the Selective Service System for manpower by the Department of Defense ended in December 1972. The 1972 lottery was, and subsequent years' lotteries will be, in effect, standby lotteries since none of the men will be subject to induction calls. Criminal prosecution in the future should, therefore, be considered against any individual in any age group who registers more than thirty (30) days after the final date set for his registration.

An alien past the age of 25 is not subject to induction but is subject to registration until the twenty-sixth anniversary of his date of birth. Where such an alien is reported for prosecution for having failed to register and he is past the age of 26, an effort should be made to induce him voluntarily to submit to registration. If he refuses, criminal prosecution should be initiated prior to the expiration of the statute of limitations at his thirty-first birthday.

PROSECUTION OF RETURNING FUGITIVES

With respect to the dismissal of indictments against fugitive defendants on grounds that valid defenses exist to the charges, it continues to be our policy that as long as the defendants continue in a fugitive status the United States Attorney will be justified in declining to review the files to

determine whether, as a result of changes in case law subsequent to the return of indictments against such defendants, valid defenses to the charges may exist. However, where the United States Attorney gains actual knowledge of the existence of a valid legal or factual defense he is not precluded from dismissing the indictment, even though the defendant is currently a fugitive and does not appear personally before the Court.

In recent months, we have had an increasing number of inquiries from United States Attorneys and the public regarding the Department's policy concerning Military Selective Service Act violators who are in fugitive status. It has been and continues to be the Department's policy to allow a defendant, in the absence of aggravating circumstances, to remove this delinquency under the Military Selective Service Act by submitting to the induction process and to authorize a dismissal of his indictment upon successful completion of induction. However, this policy terminates after July 1 with the expiration of the general induction authority provided for in § 17(c) of the Military Selective Service Act. Therefore, until July 2 upon receiving an inquiry from a fugitive defendant, his parents, or his attorney, your staff should advise that although no guarantees can be given by the Government that the fugitive will be permitted to submit to induction the fugitive should be advised that if he desires to return he must first submit himself to the jurisdiction of the court, an action which will normally result in his being arrested. Bail would, of course, be up to the court.

Should the defendant at this point offer to submit to induction and is accepted for duty, the indictment will be dismissed. If, however, the defendant submits to induction and fails to qualify for mental, physical, or moral reasons, then the United States Attorney will have to evaluate the dismissal in light of the circumstances at the time. If prolonged absence has contributed to the defendant's failure to qualify, consideration should be given to prosecution. Consideration should also be given to prosecuting in those cases involving aggravating circumstances of the type described in the Internal Security Division letter of May 10, 1972 to all United States Attorneys.

After July 1, unless the Department of Defense provides for a form of enlistment in lieu of induction, prosecution should be pursued against all indicted violators of the Military Selective Service Act when their cases have prosecutive merit.

Henry E. Petersen

HENRY E. PETERSEN
Assistant Attorney General

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES, PLAINTIFF	)	
VS.	)	INDICTMENT NO. 27,807
WAYNE F. BARNETTE, DEFENDANT	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO QUASH THE INDICTMENT

POINT I. DEFENDANT'S PRESENCE WITHIN THE JURISDICTION OF THE COURT IS NOT NECESSARY FOR AN ADJUDICATION OF THE MOTION TO QUASH THE INDICTMENT.

Rule 43 of the Federal Rules of Criminal Procedure provides that "(t)he defendant shall be present at the arraignment, at any stage of the trial. . .except as otherwise provided by these rules." This provision is in accord with the principle pervading criminal procedure that after an indictment is found, nothing shall be done at critical stages in felony cases without the presence of the accused. In Lewis v. United States, 146 U.S. 370 (1892), the Court held that the accused had the right to be confronted with the panel of prospective jurors and subsequent challenges by both sides. "And it appears to be well settled that, where the personal presence is necessary is point of law, the record must show the fact [of the accused's presence.]" at 372. However, this right may be validly and voluntarily waived in non-capital felony cases. Diaz v. United States, 223 U.S. 442 (1912); Parker v. United States, 184 F. 2d 488, 489-90 (4th Cir. 1915); United States v. Tortora, 464 F. 2d 1202, 1208 (2d. Cir. 1972).

Initially, the instant case procedurally involves Defendant's voluntary waiver of his right to be present during the

deliberations on his counsel's pre-trial motion to quash the indictment. In Snyder v. Massachusetts, 291 U.S. 97 (1934), the petitioner was not allowed to accompany the jury on its visit to the place where the crime occurred. After noting that "[M]any motions before trial are heard in the defendant's absence. . ." (at 107), the Court disclosed:

> "We assume in aid of the petitioner that is a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own power whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. . . . at 105-6.
>
> * * *
>
> Nowhere in the decisions of this Court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, in the benefit but a shadow," at 106-7.

See also United States v. Lynch, 132 F. 2d 111, 113 (3d Cir. 1942), cert. denied, 318 U.S. 777 (1943).

Defendant contends that his presence during the deliberations of the pre-trial motion to quash the indictment is not necessary. Unlike a pre-trial suppression hearing, no witnesses will be called on substantial issues of fact. United States v. Clark, 425 F. 2d 240 (2d Cir. 1973). However, in United States v. Gradsky, 434 F. 2d 880 (4th Cir. 1970), the Court decided that such an evidentiary hearing was "not one of guilt or innocence but one of 'taint,'" at 883. Regardless of the differences of judicial interpretation as to the nature of a pre-trial evidentiary hearing, it is patently clear that only when the hearing involves the guilt or innocence of the accused that his presence is necessary, Dunnivan v. Peyton , 292 F. Supp. 173, 176 (W.D. Va. 1968). Even then, it may be waived, Diaz v. United States, supra.

In sum, defendant contends that this hearing in no way bears a "reasonably substantial relationship to. . . [his] opportunity to defend and accordingly, his presence being "useless,"

Stein v. United States, 313 F. 2d 518, 522 (9th Cir. 1962), this honorable court may adjudicate the motion to quash the indictment in his voluntary absence.

POINT II. THE FAILURE OF SELECTIVE SERVICE LOCAL BOARD NO. 42 TO SEND DEFENDANT A FORM 150, AFTER HE REQUESTED SUCH IN HIS CLASSIFICATION QUESTIONNAIRE, RENDERED HIS INDUCTION ORDER INVALID.

The defendant signed Series VIII of his Classification Questionnaire (Exhibit A) and thereby, clearly indicated his intention of applying for conscientious objector status. Local Board No. 42 failed to send him the requested SSS Form No. 150 and continued to place him in the Class II-S category, until such time as he was declared to be 1-A and ordered for induction. Defendant contends that his request for SSS Form 150 required the Board to send it, before any report for induction could be ordered. Failure to do so, vitiated the order and accordingly, denied any legal basis for the ensuing indictment.

32 C.F.R. § 1621.11 imposed a mandatory duty on selective service board personnel to furnish the form to any registrant considered to hold "conscientious objector" views on war or military service. Although the regulation does not prescribe penalties for failure to observe its provisions, the courts have consistently overturned convictions for failure to report for induction where it appeared that the board failed to supply a registrant with SSS Form 150, despite knowledge of his objections to killing or to war in general.

In addition to this statutory authority, the courts have responded with similar observations. In United States v. Dewser, 327 F. Supp. 755 E.D. Pa. (1971) the defendant did not sign a request for a Special Form for Conscientious Objector which was contained on his original classification questionnaire. He was subsequently classified 1-A and given his pre-induction physical.

At a later date, the defendant was ordered to return to the examining station for a security interview, at which time he told the interviewing agent that "I am against all forms of killing, whether it be the bearing of arms or in other forms of support." The Court found that this statement was essentially tantamount to a request for SSS Form 150, and that the Board's failure to supply defendant with the form violated his right to due process of law, and thus invalidated his induction order. Defendant was acquitted of the charge of failing to report for induction.

In United States v. Turner, 421 F. 2d 1251 (3d Cir. 1970), the defendant originally made no claim to conscientious objector status and was classified 1-A. Later the defendant sought such status because of changed circumstances, but his draft board refused to reopen his 1-A classification or to send him SSS Form 150. The Court held that no formal, articulate demonstration of a desire to seek conscientious objector status was necessary on the defendant's part, as long as the Board was sufficiently apprised of facts to acquaint it with that determination.

> "The supply to a registrant of a requested Form 150 is a mandatory duty of the Board and the failure to perform this duty will vitiate a conviction for failure to report for induction," at 1255.

Thus, the Board's actions constituted a denial of his procedural rights and resulted in a reversal of his conviction for failure to report for induction. See also, Epstein v. Commanding Officer, 327 F. Supp. 1122 (E.D. Pa. 1971).

In United States v. Meyer, 307 F. Supp. 613 (S.D.N.Y. 1969), the court held that the failure of the Selective Service Board to send defendant-registrant SSS Form 150 and to consider his request for reopening and reclassification after he had mailed the Board a letter explaining moral objections to war constituted a denial of due process and thus the induction order which defendant-registrant refused to obey was invalid. The fact that he did not denominate his objections to war as "conscientious objector" status did not relieve the Board of its duty to send him the SSS

Form 150. The Court said, "A board must reopen a classification on its own motion if facts are presented which were not considered when registrant was classified which, if true, would justify a change in classification. Failure to reopen after registrant presents a prima facie case for a requested deferment violates due process of law. . ." at 615-16.

The United States v. Burns, 431 F. 2d 1070 10th Cir. (1970), the defendant had been convicted for failing to report for induction into the armed forces. On appeal, the Court of Appeals held that the conviction could not stand since he had gone to his local draft board and expressed his pacifist attitudes to the executive secretary, who erroneously had told that his beliefs would not excuse him from induction. The secretary told Defendant that his beliefs had to be based on religious training and that his background as a Catholic was insufficient grounds for C.O. status. The Court ruled that the secretary's failure to provide Defendant with SSS Form 150 invalidated his induction, and reversed the conviction.

In conclusion, the defendant clearly demonstrated his intent to pursue to his conscientious objector claim by his signature in Series VIII of the Classification Questionnaire. Nowhere in his selective service file is there a notation that the Board complied with his request. Such failure is violative of the Board's mandatory duty in this area and accordingly, the indictment must be quashed.

FILED

U. S. DISTRICT COURT
WESTERN DIST. KENTUCKY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 27,807

UNITED STATES OF AMERICA PLAINTIFF

v.

WAYNE FORD BARNETTE DEFENDANT

M O T I O N

Comes the United States of America, plaintiff, by counsel, George J. Long, United States Attorney and respectfully advises the Court and moves as follows.

The defendant by counsel has filed with this Court a motion to quash Indictment No. 27,807 and has filed therewith a memorandum in support of defendant's motion.

The United States moves the Court to pass this matter for a period of thirty days, as counsel has requested the Attorney General of the United States for authority to dismiss the above indictment for the reason that the defendant on May 20, 1965, in filling out the Selective Service System's Classification Questionnaire, SS Form No. 100, did check series VIII - conscientious objector and did sign said section requesting he be furnished special form for conscientious objector (SS Form No. 150). Local Board No. 42 did not send SS Form No. 150 to the defendant as requested. Upon receipt of written authority from the Attorney General authorizing the United States Attorney to make a motion to dismiss the indictment, said motion and order will be filed with the Court.

Respectfully submitted,

George J. Long
United States Attorney

IT IS SO ORDERED THIS 11 DAY OF Dec, 1973.

ENTERED
DEC 11 1973

JUDGE, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 27,807

UNITED STATES OF AMERICA — PLAINTIFF

v.

WAYNE FORD BARNETTE — DEFENDANT

MOTION TO DISMISS INDICTMENT

Comes the United States of America, by counsel, and by authority of the Attorney General of the United States first obtained, moves the Court to dismiss the Indictment herein, charging the defendant, Wayne Ford Barnette, with violation of Section 462, Title 50 Appendix, United States Code, for the reason that there is insufficient evidence to prove guilty beyond a reasonable doubt.

Respectfully submitted,

GEORGE J. LONG
GEORGE J. LONG
United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss Indictment were mailed this 24th day of January, 1974, to Counsel for Defendant, Mr. Jerry Becker, 1505 W. Cumberland, Knoxville, Tennessee 37917.

GEORGE J. LONG

George J. Long
United States Attorney

Rendered
1-24-74

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CRIMINAL ACTION NO. 27,807

UNITED STATES OF AMERICA PLAINTIFF

v.

WAYNE FORD BARNETTE DEFENDANT

O R D E R

Upon motion of the United States of America filed herein, and for the reason stated,

It is ORDERED that the Indictment herein, charging the defendant, Wayne Ford Barnette, with violation of Section 462, Title 50 Appendix, United States Code, be and the same hereby is, dismissed.

It is FURTHER ORDERED that any bond executed by the defendant for his appearance in this Court be cancelled, and any surety on said bond is released from all further liability on the bond.

Dated this 28th day of January, 1974.

JUDGE, U. S. DISTRICT COURT

cc: United States Attorney

cc: United States Marshal

cc: United States Probation Officer

cc: FBI, Louisville, Kentucky

cc: Mr. Jerry Becker
1505 W. Cumberland
Knoxville, Tennessee 37916
Counsel for Defendant

cc: State Headquarters for Selective Service
330 West Broadway
Frankfort, Kentucky 40601

cc: Office of the General Counsel
National Headquarters
Selective Service System
1724 F. Street, N.W.
Washington, D. C. 20435

ENTERED
JAN 28 1974
AUGUST M. HECKINGER, JR., CLERK
BY DEPUTY CLERK